Amended Complaint Filed January 30, 1956

(Record, pages 1156-1197)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The plaintiffs by Henry Pearlman their attorney for their Amended Complaint, allege:

First: That the above named Tivoli Theatre, Inc. was incorporated under the laws of the State of Florida, on or about June 25, 1928.

Second: That in or about the month of June, 1928, the said Tivoli Theatre, Inc. became the owner in fee of the premises known as and by the street number 734-744 West Flagler Street, in the City of Miami, State of Florida.

Third: That the said premises consisted of a single purpose building which, with the exception of two small offices and two small stores, was designed for and as a motion picture threatre with a seating capacity of approximately 925 seats.

Fourth: That on or about July 24, 1931, The Walwal Corporation was incorporated under the laws of the State of Florida; and that the individual plaintiffs, Charles Walder, Ethel L. Walder, Alvin Walder and Lester Walder, since the incorporation of said corporation were and still are all the stockholders, officers and directors thereof.

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Fifth: That in or about the month of June 1928, the said Tivoli Theatre, Inc. commenced to operate said theatre, as owner in fee of said premises, and continued to so operate the same, as owner in fee thereof, until on or about August, 1931, when it conveyed the whole of said premises to the said The Walwal Corporation, and thereupon the said Tivoli Theatre, Inc. continued to operate said theatre, as lessee thereof, from the said The Walwal Corporation, until on or about January, 1937.

Sixth: That ever since the conveyance of said premises from said Tivoli Theatre, Inc., to the said The Walwal Corporation, the said The Walwal Corporation has been and continued to be and still is the owner in fee of the whole of said premises, including said motion picture theatre.

Seventh: That the plaintiffs Charles Walder, Ethel L. Walder, Alvin Walder and Lester Walder, from the inception of the incorporation of said Tivoli Theatre, Inc., and until the dissolution thereof, as hereinafter set forth, were the stockholders, directors and officers of said Tivoli Theatre, Inc.

Eighth: That the plaintiffs Charles Walder, Ethel L. Walder, Alvin Walder and Lester Walder were and still are residents and citizens of the State of Florida.

Ninth: That the said Tivoli Theatre, Inc., was dissolved voluntarily on or about the 7th day of April, 1937, for the causes as hereinafter stated, and that the plaintiffs Charles Walder, Ethel L. Walder, Alvin Walder and Lester Walder, constituted the last board of directors of said Tivoli Theatre, Inc., and that by operation of the Statutes of Florida the said four directors became the trustees of the said Tivoli Theatre, Inc.

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Tenth: That the above named Tivoli Operating Corporation was duly incorporated under the laws of the State of Florida in or about the year 1936.

Eleventh: That in or about January 1937, the said Tivoli Operating Corporation became the lessee and operator of said motion picture threatre from the said The Walwal Corporation, and continued to operate said theatre until in or about May, 1947, as hereinafter more particularly set forth.

Twelfth: That the said The Walwal Corporation, upon the incorporation of the said Tivoli Operating Corporation, became the owner and holder of one-half of the issued shares of stock of said Tivoli Operating Corporation, and that the Paramount Enterprises, Inc., hereinafter referred to, became the owner and holder of the remaining one-half of the issued shares of stock of the said Tivoli Operating Corporation.

Thirteenth: That the plaintiffs Charles Walder and Ethel L. Walder and the above named defendant Fred H. Kent, and one Frank Rogers, now deceased, from the inception of the incorporation of said Tivoli Operating Corporation and until the dissolution thereof, as hereinafter set forth, were the directors and officers of said Tivoli Operating Corporation.

Fourteenth: That the said Tivoli Operating Corporation was duly dissolved voluntarily on or about August 17, 1948, for the causes as hereinafter stated; and that the plaintiffs Charles Walder and Ethel L. Walder, and the defendant Fred H. Kent, and the said Frank Rogers, now deceased, constituted the last board of directors of said

Tivoli Operating Corporation, and that by operation of the Statutes of Florida, the said four directors became the trustees of said Tivoli Operating Corporation; that by reason of the death of the said Frank Rogers, only three of said directors now constitute the trustees of said Tivoli Operating Corporation; that the said Charles Walder and Ethel L. Walder are suing herein as plaintiff-trustees of said Tivoli Operating Corporation, and that the said Fred H. Kent, is made a party defendant, as his interests are diametrically opposed to that of the said Charles Walder and Ethel L. Walder, and for that reason no demand was made upon the said Fred H. Kent to join as plaintiff, as such demand would be futile, and for the reasons more particularly hereinafter set forth.

Fifteenth: That upon information and belief, that the defendant Paramount Publix Corporation was and still is a corporation and organized under the laws of the State of New York.

Sixteenth: That upon information and belief, that the defendant Paramount Pictures, Inc., was and still is a corporation, incorporated under the laws of the State of New York.

Seventeenth: That upon information and belief, that the defendant United Paramount Theatres, Inc., was and still is a corporation and organized under the laws of the State of New York.

Eighteenth: That upon information and belief, that the defendant Paramount Pictures Corporation was and still is a corporation and organized under the laws of the State of New York.

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Nineteenth: That upon information and belief, that the defendant corporations specified and mentioned in the preceding paragraphs "Fifteenth" to "Eighteenth", inclusive, of this complaint, were and still are affiliated with each other; that each of said corporations mentioned in said paragraphs "Fifteenth" to "Eighteenth", inclusive, had and still has a proprietary and financial interest in each of the corporations of the other; that all of said corporations had and still have between and among them, interlocking stockholders, directors and officers; and that said corporations have united, combined, and conspired between and among themselves in the commission of the unlawful acts hereinafter mentioned.

Twentieth: That upon information and belief, that the defendant Paramount Film Distributing Corporation, was and still is a corporation, incorporated under the laws of the State of Delaware.

Twenty-first: That upon information and belief that at and during all the times herein mentioned, the defendant Paramount Film Distributing Corporation was and still is a wholly owned subsidiary of the defendant Paramount Publix Corporation, and of the other defendant corporations mentioned in the preceding paragraphs marked "Sixteenth", "Seventeenth" and "Eighteenth" of this complaint; and that the defendant Paramount Film Distributing Corporation was engaged in the distribution branch of the motion picture industry, and otherwise, in the State of Florida, and other States; and that said defendant Paramount Film Distributing Corporation was and still is dominated and controlled by the said defendant four corporations, and by the stockholders, directors and officers of the said four defendant corporations; and that the said defendant Paramount Film Distributing Corporation had

and still has with each of the four defendant corporations, aforesaid, interlocking stockholders, directors and officers; and that the said four defendant corporations united, combined and conspired with the defendant Paramount Film Distributing Corporation in the commission of the unlawful acts hereinafter mentioned.

Twenty-second: That upon information and belief, that E. J. Sparks Enterprises, Inc. was and still is a corporation incorporated under the laws of the State of Florida.

Twenty-third: That upon information and belief, that the said E. J. Sparks Enterprises, Inc., at and during all the times herein mentioned, was and still is a wholly owned subsidiary of the defendant Paramount Publix Corporation, and of the other defendant corporations mentioned in the preceding paragraphs marked "Sixteenth", "Seventeenth" and "Eighteenth" of this complaint; that the said E. J. Sparks Enterprises, Inc. was engaged in the exhibition branch of the motion picture industry, and otherwise, in the State of Florida; that the said defendant E. J. Sparks Enterprises, Inc. was and still is dominated and controlled by the said four defendant corporations and by the stockholders, directors and officers of the said four defendant corporations; that the said E. J. Sparks Enterprises, Inc. had and still has with each of the said four defendant corporations, aforesaid, interlocking stockholders, directors and officers; and that the said four defendant corporations united, combined and conspired with the said E. J. Sparks Enterprises, Inc., in the commission of the unlawful acts hereinafter mentioned.

Twenty-fourth: That upon information and belief, that Paramount Enterprises, Inc. was and still is a corporation, incorporated under the laws of the State of Florida.

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Twenty-fifth: That upon information and belief, that at and during all the times herein mentioned, the said Paramount Enterprises, Inc. was and still is a wholly owned subsidiary of the defendant Paramount Publix Corporation, and of the other defendant corporations mentioned in the preceding paragraphs marked "Sixteenth", "Seventeenth" and "Eighteenth" of this complaint; and that the said Paramount Enterprises, Inc. was engaged in the exhibition branch of the motion picture industry, and otherwise, in the State of Florida; and that said Paramount Enterprises, Inc., was and still is dominated and controlled by the said four defendant corporations, and by the stockholders, directors and officers of the said four defendant corporations; and that the said defendant Paramount Enterprises, Inc., had and still has with each of the said four defendant corporations, aforesaid, interlocking stockholders, directors and officers; and that the said four defendant corporations united and combined and conspired with the said Paramount Enterprises, Inc., in the commission of the unlawful acts hereinafter mentioned.

Twenty-sixth: That upon information and belief, that Florida State Theatres, Inc., was and still is a corporation, incorporated under the laws of the State of Florida.

Twenty-seventh: That upon information and belief, that at and during all the times herein mentioned, the said Florida State Theatres, Inc., was and still is a wholly owned subsidiary of the defendant Paramount Publix Corporation, and of the other defendant corporations mentioned in the preceding paragraphs marked "Sixteenth", "Seventeenth" and "Eighteenth" of this complaint; that said Florida State Theatres, Inc. was engaged in the exhibition branch of the motion picture industry, and otherwise, in the State of Florida; that said defendant Florida State Theatres, Inc., was and still is dominated and controlled by the said defendant four corporations, and by the stock-

holders, directors and officers of the said four defendant corporations; that the said Florida State Theatres, Inc. had and still has with each of said four defendant corporations, aforesaid, interlocking stockholders, directors and officers; and that the said four defendant corporations united, combined and conspired with the said Florida State Theatres, Inc., in the commission of the unlawful acts hereinafter mentioned.

Twenty-eighth: That upon information and belief, that the defendants Paramount Publix Corporation, Paramount Pictures, Inc., United Paramount Theatres, Inc., Paramount Pictures Corporation and Paramount Film Distributing Corporation, and with their affiliates and subsidiaries, owned approximately twelve hundred (1200) motion picture theatres in and throughout the United States.

Twenty-ninth: That the said Paramount Enterprises, Inc., E. J. Sparks Enterprises, Inc., and Florida State Theatres, Inc., named in this complaint, are not made parties to this action, because they are not subject to the jurisdiction of this Court, and cannot be made parties to this action without depriving this Court of jurisdiction.

Thirtieth: That upon information and belief, that the defendant Radio-Keith-Orpheum Corporation was and still is a corporation organized under the laws of the State of Maryland.

Thirty-first: That upon information and belief that the defendant RKO Film Distributing Corporation was and still is a corporation organized under the laws of the State of Delaware.

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Thirty-second: That upon information and belief, that the defendant RKO Pictures Corporation was and still is a corporation organized under the laws of the State of Delaware.

Thirty-third: That upon information and belief, that the defendant RKO Radio Pictures, Inc. was and still is a corporation organized under the laws of the State of Delaware; and, that at and during all the times herein mentioned, the defendant RKO Radio Pictures, Inc. was and still is a wholly owned subsidiary of the defendant Radio-Keith-Orpheum Corporation.

Thirty-fourth: That upon information and belief, that the defendants Radio-Keith-Orpheum Corporation, RKO Film Distributing Corporation, RKO Pictures Corporation, and RKO Radio Pictures, Inc., were and still are affiliated with each other; that each of said four corporations had and still has a proprietary and financial interest in each of the other said corporations; that all of said four corporations had and still have between and among them, interlocking stockholders, directors and officers; and that said four corporations united, combined and conspired between and among themselves, in the commission of the unlawful acts hereinafter mentioned.

Thirty-fifth: That upon information and belief, that the defendant Radio-Keith-Orpheum Corporation, RKO Film Distributing Corporation, RKO Pictures Corporation and RKO Radio Pictures, Inc., and with their affiliates and subsidiaries, owned approximately one hundred and twenty (120) motion picture theatres in the United States.

Thirty-sixth: That upon information and belief, that the defendant Vitagraph, Inc., was a corporation organized

under the laws of the State of New York and thereafter changed its name to Warner Bros. Pictures Distributing Corporation.

Thirty-seventh: That upon information and belief, that the defendant Warner Bros.-First National Pictures, Inc., was and still is a corporation organized and existing under and by vitrue of the laws of the State of New York.

Thirty-eighth: That upon information and belief, that the defendant Warner Bros. Pictures, Inc. was and still is a corporation organized and existing under and by virtue of the laws of the State of New York.

Thirty-ninth: That upon information and belief, that the defendant Warner Bros. Pictures Distributing Corporation (formerly known as Vitagraph, Inc.) was and still is a corporation organized and existing under and by virtue of the laws of the State of New York.

Fortieth: That upon information and belief, that the defendant Warner Bros. Pictures Distributing Corporation (formerly known as Vitagraph, Inc.), was a wholly owned subsidiary of the defendant Warner Bros. Pictures, Inc., and that said Warner Bros. Pictures Distributing Corporation was engaged in the business of distributing motion pictures in the State of Florida and other States.

Forty-first: That upon information and belief, that the defendants Vitagraph, Inc., Warner Bros.-First National Pictures, Inc., Warner Bros. Pictures, Inc., and Warner Bros. Pictures Distributing Corporation, were and still are affiliated with each other; that each of said four corporations had and still has a proprietary and financial interest in each of the other said corporations; that all of

said corporations had and still have between and among them, interlocking stockholders, directors and officers; and that said four corporations united, combined and conspired between and among themselves, in the commission of the unlawful acts hereinafter mentioned.

Forty-second: That upon information and belief, that the defendants Vitagraph, Inc., Warner Bros.-First National Pictures, Inc., Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation, and with their affiliates and subsidiaries, owned approximately five hundred (500) motion picture theatres in the United States.

Forty-third: That upon information and belief that the defendant Fox Film Corporation was and still is a corporation organized and existing under and by virtue of the laws of the State of New York.

Forty-fourth: That upon information and belief, that the defendant Twentieth Century-Fox Film Corporation was and still is a corporation organized and existing under and by virtue of the laws of the State of New York.

Forty-fifth: That upon information and belief, that the defendant Twentieth Century-Fox Film Corporation was and still is engaged in the business of producing, distributing and exhibiting motion pictures, either directly or through subsidiaries or associated companies, in various parts of the United States, including the State of Florida; and that it, and its subsidiary companies, owned approximately five hundred (500) motion picture theatres in the United States.

Forty-sixth: That upon information and belief, that the defendant Fox Film Corporation and the defendant

Twentieth Century-Fox Film Corporation, were and still are affiliated with each other; that each of said two corporations had and still has a proprietary and financial interest in the corporation of the other; that both of said corporations had and still have between them interlocking stockholders, directors and officers; and that said two corporations united, combined and conspired together in the commission of the unlawful acts hereinafter mentioned.

Forty-seventh: That upon information and belief, that the defendant Columbia Pictures Corporation was and still is a corporation organized and existing under and by virtue of the laws of the State of New York.

Forty-eighth: That upon information and belief, that the defendant Columbia Pictures Corporation was and still is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies in various parts of the United States, including the State of Florida.

Forty-ninth: That upon information and belief, that the defendants Adolph Zukor, Barney Balaban, Y. Frank Freeman, Stanton Griffis, Fred Mohrhardt, Harvey D. Gibson, Maurice Newton, Stephen Gallaghan, Leonard H. Goldenson, A. Conger Goodyear, Earle J. McClintock, John B. Hertz, and Duncan G. Harris, were and still are officers, directors, stockholders and agents of the defendants Paramount Publix Corporation, Paramount Pictures, Inc., United Paramount Theatres, Inc., Paramount Pictures Corporation and Paramount Film Distributing Corporation; and upon further information and belief, that the said individual defendants, were and still are officers, directors, stockholders and agents of the said E. J. Sparks Enter-

prises, Inc., Paramount Enterprises, Inc. and Florida State Theatres, Inc., and participated in and contributed towards the commission of the wrongful and unlawful acts hereinafter mentioned on the part of all of said corporations and shared in the benefits, moneys and profits realized from the commission of said wrongful and unlawful acts directly or indirectly.

Fiftieth: That upon information and belief, that the individual defendants mentioned and described in the preceding paragraph next hereof, are residents and citizens of the State of New York, or are residents and citizens of States other than the State of Florida.

Fifty-first: That upon information and belief, that the defendants Hiram S. Brown, Joseph Plunket, J. Miller Walker, Leo Spitz, B. B. Kahane, William Mallard, Herman Zohbel, P. M. Stern, Gordon E. Young, O. R. McMahon, M. H. Aylesworth, Cornelius N. Bliss and Maurice Goodman, were and still are officers, directors, stockholders and agents of the defendant corporations Radio-Keith-Orpheum Corporation, RKO Film Distributing Corporation, RKO Pictures Corporation and RKO Radio Pictures, Inc., and participated in and contributed towards the commission of said wrongful and unlawful acts hereinafter mentioned on the part of said defendant corporations, and shared in the benefits, moneys and profits realized from the commission of said wrongful and unlawful acts directly or indirectly.

Fifty-second: That upon information and belief, that the individual defendants mentioned and described in the preceding paragraph next hereof, are residents and citizens of the State of New York, or are residents and citizens of States other than the State of Florida.

Fifty-third: That upon information and belief that the defendants Harry M. Warner, Albert Warner, Jack L. Warner, Sam E. Harris, Herman Starr, Waddill Catchings, Stanleigh R. Friedman and Samuel Carlisle, were and still are officers, directors, stockholders and agents of the defendants Vitagraph, Inc., Warner Bros.-First National Pictures, Inc., Warner Bros. Pictures, Inc. and Warner Bros. Pictures Distributing Corporation, and participated in and contributed towards the commission of and wrongful and unlawful acts hereinafter mentioned on the part of said defendant corporations, and shares in the benefits, moneys and profits realized from the commission of said wrongful and unlawful acts directly or indirectly.

Fifty-fourth: That upon information and belief, that the individual defendants mentioned and described in the preceding paragraph next hereof, are residents and citizens of the State of New York, or are residents and citizens of States other than the State of Florida.

Fifty-fifth: That upon information and belief, that the defendants Joseph M. Schenck, Sidney R. Kent, William C. Michel, Darryl F. Zanuck, William Goetz, Sidney Towell, Felix A. Jenkins, H. C. Clarke and Spyros P. Skouras, were and still are officers, directors, stockholders and agents of the defendant corporations Fox Film Corporation and Twentieth Century-Fox Film Corporation, and participated in and contributed towards the commission of the said wrongful and unlawful acts hereinafter mentioned on the part of said defendant corporation, and shared in the benefits, moneys and profits realized from the commission of said wrongful and unlawful acts directly or indirectly.

Fifty-sixth: That upon information and belief, that the individual defendants mentioned and described in the pre-

ceding paragraphs next hereof, are residents and citizens of the State of New York, or are residents and citizens of States other than the State of Florida.

Fifty-seventh: That upon information and belief, that the defendants Harry Cohn, Jack Cohn, A. Schneider, Charles Schwartz, Saul Bornstein, Leo M. Blancke, Jack Kerner and L. J. Barbano, were and still are officers, directors, stockholders and agents of the defendant Columbia Pictures Corporation, and participated in and contributed towards the commission of the said wrongful and unlawful acts hereinafter mentioned on the part of said defendant corporation, and shared in the benefits, moneys and profits realized from the commission of said wrongful and unlawful acts directly or indirectly.

Fifty-eighth: That upon information and belief, that the individual defendants mentioned and described in the preceding paragraph next hereof, are residents and citizens of the State of New York, or are residents and citizens of States other than the State of Florida.

Fifty-ninth: That the jurisdiction of this Court to hear this complaint is based upon the diversity of citizenship of each of the plaintiffs to each of the defendants; and upon the fact that the controversy involves an amount of money in excess of three thousand ($3,000.00) dollars, exclusive of interest and costs; and also upon the further ground that this Court has original jurisdiction "of all suits and proceedings arising under any law to protect trade and commerce against restraint and monopolies;" and, as hereinafter set forth, this controversy involves a violation of Sections 1, 2 and 7 of the Act known as the "*Sherman Anti-Trust Act*" (Act of July 2, 1890, Chap. 647, 26 Stat. 209, as

amended; 15 U. S. Code, Sec. 1, et seq.) and Sections 1, 5 and 15 of the Act known as "*the Clayton Anti-Trust Act*" (Act of October 15, 1914, Chap. 323, 38 Stat. 730, as amended; 15 U. S. Code, Secs. 12-27, 18 U. S. Code, Sec. 412, 28 U. S. Code, Secs. 381-383, 386, 390, 29 U. S. Code, Sec. 52).

Sixtieth: That plaintiffs aver that this complaint is filed for the purpose of securing damages for injuries suffered in the businesses and properties of Tivoli Theatre, Inc., Tivoli Operating Corporation, the individual plaintiffs, the Walwal Corporation, and the Tivoli Amusement Company, Inc. on account of unlawful acts, conspiracies and combinations by and between and among the defendants herein, in restraint of trade and commerce, forbidden by the Anti-Trust Statutes of the United States, as more fully shown hereinafter; that the unlawful acts, conspiracies and combinations aforesaid have been not only by, between and among the defendants, but have existed also between and among them and other persons, natural and artificial, as will be more fully shown hereafter.

Sixty-first: That on July 20, 1938, the United States Government, through the Attorney General, filed in the District Court of the United States for the Southern District of New York, a suit in equity known as No. 87-273, wherein the United States of America was plaintiff and the identical corporations, who are defendants in this cause, were likewise defendants, together with other persons, natural and artificial; that said suit was filed under Section 4 of the Act of Congress, 1890, 15 U. S. C. A., entitled "*An Act to protect trade and commerce against unlawful restraint and monopolies*", commonly known as the *Sherman Act*, and instituted to prevent further violations by the defendants herein (and others) of Sections 1 and 2 of that

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Act, 15 USCA, paragraphs 1, 2, and wherein said defendants herein (with others) were charged with combining and conspiring unreasonably to restrain trade and commerce in the distribution and exhibition of motion pictures and to monopolize such trade and commerce in violation of the Sherman Act; and that said suit is commonly known as "*U. S.* v. *Paramount*" and various proceedings thereof have been reported, viz.:

(a) *U. S.* v. *Paramount Pictures, et al.*, 66 F. Supp. 323 (June 11, 1946);

(b) *U. S.* v. *Paramount Pictures, et al.*, 70 F. Supp. 53 (December 31, 1946);

(c) *U. S.* v. *Paramount Pictures, et al.*, 334 U. S. 131; 68 S. C. T. 915, 92 L. Ed. 1260 (May 3, 1948);

(d) *U. S.* v. *Paramount Pictures, et al.*, 85 F. Supp. 881 (July 25, 1948);

and that said decisions are prayed to be made a part hereof, in haec verba.

Sixty-second: That upon information and belief, that said suit by the United States Government against Paramount Pictures, Inc., et al., is still pending; and that the District Court for the Southern District of New York entered an additional decree in said cause February 8, 1950, and an appeal from that decree has been taken to the Supreme Court of the United States; and that the record on appeal thereon was certified to said Court of last resort May 22, 1950; and that upon information and belief, that no final disposition of the cause has yet been made.

Sixty-third: That Section 16 of Title 15 (4 F. C. A. supra) provides as follows:

"Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the anti-trust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceedings shall be suspended during pendency thereof" (October 15, 1914, c. 323, p. 5, 38 Stat. 731).

Sixty-fourth: That this action is based upon private rights, arising under said Anti-Trust Laws, based in whole or in part on matters complained of in *"U. S. v. Paramount"*, above mentioned; that this is more fully shown by reference to the reported decisions hereinbefore cited; and that this suit is brought against the defendants in this cause who were and still are, likewise, defendants in said cause of *"U. S. v. Paramount"*.

Sixty-fifth: That among the matters (but not all) complained of in said *"U. S. v. Paramount"* were acts by the defendants there, and who are now defendants herein, viz.:

(a) Enforcing unreasonable clearances against independent theatre owners or exhibitors.

(b) Protection to preferred exhibitor chains controlling several theatres to the detriment of independent theatre owners or exhibitors.

(c) Enforcement of minimum admission prices upon independent theatre owners or exhibitors.

(d) Preferential modification and reduction of film rentals allowed exhibitor chains but not to independent theatre owners or exhibitors.

(e) In addition, other acts and illegal practices were shown.

Sixty-sixth: That the same illegal practices, as set forth in the preceding paragraph next hereof, are complained of herein, together with other acts in violation of the Anti-Trust Laws.

Sixty-seventh: That all of the defendant co orations were and are engaged in interstate commerce and business and were so engaged at all times hereinbefore and hereinafter mentioned, in that they all shipped or caused to be shipped, motion picture films through various States of the Union, into the State of Florida, as well as other States, and licensed said films after exhibition in Florida, and other States, and finally giving shipping instructions to said exhibitors who, upon such instructions, shipped the films to other places among the various States of the Union.

Sixty-eighth: That the said Tivoli Theatre, Inc., as hereinbefore set forth, operated the said Tivoli Theatre for the exhibition of motion picture films continuously from on or about June 1928 to in or about January 1937; that thereafter, the said Tivoli Operating Corporation, as hereinbefore stated, continued to operate said theatre, from January 1937 to in or about May 1947; and that said Tivoli Theatre, Inc., and the said Tivoli Operating Corporation, as licensees of motion picture films produced outside of the State of Florida and transported into the State of Florida pursuant to licensing agreements, were engaged in interstate commerce.

Sixty-ninth: That almost all films of public popularity featuring well-known male and female stars and possessing the greatest public appeal were produced and distributed

by the defendant corporations above named, and one other, which were and are the major producers in the United States; that exhibitors possessed no opportunity for successful operation unless they had access to the products of the defendant corporations, or at least some of them; and that between 95% and 99% of all the feature pictures played in first run metropolitan motion picture houses through the United States were released by the major producers, namely, the above-named defendant corporations and one other.

Seventieth: That the above named producers, distributors, theatre owners and operators, being the defendants, and each of them, were engaged in a continuing conspiracy together, contrary to the provisions of the "Sherman Anti-Trust Act" and the "Clayton Anti-Trust Act", as hereinabove referred to, to illegally maintain in the City of Miami and its environs, a system of releasing motion picture film for exhibition in such a manner that theatres owned, leased and operated by any of the defendants, or by the subsidiaries of any of them, were given preference and priority in the exhibition of moving picture film over independent exhibitors and enjoyed prior runs of desirable motion pictures and enjoyed clearance over comparable and competing theatres not owned, controlled, leased or operated by any of the defendant companies; and that a system of release had been set up and existed by virtue of agreements between said defendants made pursuant to such conspiracy in restraint of trade, as hereinafter provided.

Seventy-first: That the so called "first run" theatres were located on the main street of Miami, known as East Flagler Street, and that all of such "first run" theatres were operated by the defendant Paramount Publix Corporation, and Paramount Pictures, Inc., Paramount Film

Distributing Corporation, and their subsidiaries and affiliates, Paramount Enterprises, Inc., E. J. Sparks Enterprises, Inc. and Florida State Theatres, Inc., and that the said theatres operated by the said defendants, and/or their subsidiaries and affiliates, were given the right to exhibit any "first run" film produced by any of the defendants for a certain period of time; and that upon the conclusion of such "first run" exhibitions, the defendants then licensed the exhibition of such film to the "neighborhood theatres", in outlying districts operated by said defendants, at various intervals, apart, known as "subsequent runs", and which "subsequent runs" comprised a period of approximately sixty-seven (67) days from the commencement date of the "first-run" exhibitions; and that although the defendants had completed showings of such film at all of its theatres located in said outlying districts, the defendants unreasonably withheld the licensing of said film to the plaintiffs, until three to five months elapsed, after the completion of said "subsequent runs", comprising 67 days, as aforesaid.

Seventy-second: That the theatres which were granted said desirable "runs" by the defendant distributors were owned and operated by one or more of the defendants, controlled by or affiliated with said defendant distributors or one or more of them, and said system was designed and used by the defendants to create unreasonable clearance in favor of distributor-controlled or affiliated theatres, over independent theatres, and to give the more advantageous playing position, or "runs" to the theatres owned and operated by or affiliated with any of the defendant distributors of motion picture film, and thus to suppress the competition of independent theatres, and that the entire system of release was utilized by the defendants to further an unlawful and illegal conspiracy and agreement, whereby inde-

pendent theatres were prevented from competing on equal terms with the producer and distributor-owned or affiliated theatres for the right to exhibit motion picture film; and the plaintiffs' theatre known as the Tivoli Theatre, was by virtue of this illegal system of release and its illegal use by the distributor defendants, unable to obtain the license of film from any of the defendant distributors until approximately from the fifth to the ninth month after the conclusion of the playing of such film in the so-called "first run" theatres.

Seventy-third: That by virtue of their geographical location the immediate competitors of the said Tivoli Theatre were the following theatres enjoying the following respective "runs", and owned by the following respective defendants, to wit:

(a) That the Paramount Theatre, located on East Flagler Street, between Second and Third Avenues, Miami, Florida, with a seating capacity of approximately 1282 seats, played "first run" pictures, and was owned and operated by the defendants Paramount Publix Corporation, Paramount Pictures, Inc., and Paramount Film Distributing Corporation, and their subsidiaries and affiliates Paramount Enterprises, Inc., Florida State Theatres, Inc. and E. J. Sparks Enterprises aforesaid.

(b) That the Olympia Theatre, located on East Flagler Street, between First and Second Avenues, Miami, Florida, with a seating capacity of approximately 2162 seats, played "first run" and "second run" pictures, and was owned and operated by the defendants Paramount Publix Corporation, Paramount Pictures, Inc., and Paramount Film Distributing Corporation, and their subsidiaries and affiliates Paramount Enterprises, Inc., Florida State Theatres, Inc., and E. J. Sparks Enterprises aforesaid.

(c) That the Rex Theatre, located on East Flagler Street, between Second and Third Avenues, Miami, Florida, with a capacity of approximately 882 seats, played "subsequent run" pictures, and was owned and operated by the defendants Paramount Publix Corporation, Paramount Pictures, Inc., and Paramount Film Distributing Corporation, and their subsidiaries and affiliates Paramount Enterprises, Inc., Florida State Theatres, Inc., and E. J. Sparks Enterprises, aforesaid.

(d) That the Roxy Theatre, located on South East First Avenue, between East Flagler Street and South East First Street, Miami, Florida, played "subsequent run" pictures, and was owned and operated by the defendants Paramount Publix Corporation, Paramount Pictures, Inc., and Paramount Film Distributing Corporation, and their subsidiaries and affiliates Paramount Enterprises, Inc., Florida State Theatres, Inc., and E. J. Sparks Enterprises, aforesaid.

(e) That the Rosetta Theatre, located on North East Second Avenue, at 79th Street, Miami, Florida, with a capacity of approximately 948 seats, played "subsequent run" pictures, and was owned and operated by the defendants Paramount Publix Corporation, Paramount Pictures, Inc., and Paramount Film Distributing Corporation, and their subsidiaries and affiliates Paramount Enterprises, Inc., Florida State Theatres, Inc., and E. J. Sparks Enterprises, aforesaid.

(f) That the Coral Gables Theatre, located in Coral Gables (adjoining Miami), Florida, with a capacity of approximately 1277 seats, played "subsequent run" pictures, and was owned and operated by the defendants Paramount Publix Corporation, Paramount Pictures, Inc., and Paramount Film Distributing Corporation, and their

subsidiaries and affiliates Paramount Enterprises, Inc., Florida State Theatres, Inc., and E. J. Sparks Enterprises, aforesaid.

(g) That the Flagler Theatre located on West Flagler Street, between Third and Fourth Avenues, Miami, Florida, with a capacity of approximately 888 seats, played "subsequent run" pictures, and was owned and operated by the defendants Paramount Publix Corporation, Paramount Pictures, Inc., and Paramount Film Distributing Corporation, and their subsidiaries and affiliates Paramount Enterprises, Inc., Florida State Theatres, Inc., and E. J. Sparks Enterprises, aforesaid.

Seventy-fourth: That pursuant to such illegal agreement and conspiracy, and in order to destroy the business of said Tivoli Theatre, in competition with distributor-owned, controlled or operated or affiliated theatres, none of the defendant distributors or producers of motion picture film would license any "features" film to the operators of said Tivoli Theatre for exhibition, prior to the expiration of 67 days, or until the playing of such film in the "subsequent run" theatres, which resulted in the operators of said Tivoli Theatre being unable to obtain any feature film for exhibition until after such film had been exhibited by all of the theatres competing with the Tivoli Theatre.

Seventy-fifth: That said unlawful conspiracy in contravention of the provisions of Sections 1 and 2 of the "Sherman Act" is a contract and combination and conspiracy and monopoly in restraint of trade and interstate commerce, in that the licensing of motion picture film produced in states, other than the State of Florida, is a transaction in interstate commerce, and the unlawful agreement and conspiracy and monopoly in restraint of said com-

merce, complained of herein, is expressly prohibited by the provisions of the "Sherman Anti-Trust Act" and the "Clayton Anti-Trust Act," hereinbefore referred to.

Seventy-sixth: That by reason of the ownership and control of the competitors of Tivoli Theatre, by the producer and exhibitor defendants, as aforesaid, and by reason of the other defendants acting in concert with them, the defendants have prevented the operators of said Tivoli Theatre from securing "subsequent run" films on a competitive basis; that the operators of said Tivoli Theatre have thus been relegated to a very inferior position in the exhibition of motion picture film, and compelled, by virtue of said unlawful conspiracy, to accept pictures for exhibition after the defendants' affiliated theatres were through with the exhibition of the same, and that the operators of said Tivoli Theatre were subjected to unfavorable conditions of availability, including clearance; and that the said operators of said Tivoli Theatre have thus been denied a free, open and untrammeled market in which to buy products based upon their ability and willingness to pay fair and reasonable film rentals; and that pursuant to such unlawful conspiracy, the competing theatres herein named have been granted unreasonable, discriminatory and arbitrary clearance and "runs" over the said Tivoli Theatre, and the operators of said Tivoli Theatre have thus been discriminated against and in favor of the theatres owned by the defendants.

Seventy-seventh: That since 1928, the owners and operators of Tivoli Theatre on various and divers occasions, demanded of defendants more favorable run of pictures and the same clearances enjoyed by like theatres, owned, operated and or controlled by defendants, but all

of said requests were rejected by defendants with the exception of the period of time between 1937 and 1947, as is hereinafter more fully set forth.

Seventy-eighth: That since 1928 and continuously up to the present time, defendants have so interfered with plaintiff's free operation of the Tivoli Theatre, that up to and including the present time, the Tivoli Theatre has been operated at a great loss of revenue.

Seventy-ninth: That by reason of the foregoing conspiracy and practices of defendants, the Tivoli Theatre, Inc. during the period 1931 and 1937, as lessee and operator of the Tivoli Theatre, was unable to operate the theatre leased by it from the plaintiff Walwal Corporation, at a reasonable profit and was obliged to default in the payment of rent pursuant to its lease. As a result thereof, the rental and market value of the Tivoli Theatre was and is materially injured all to the damage of the property and business of the Walwal Corporation. As a result thereof, said Walwal Corporation was unable to meet its mortgage and tax payments and was forced to borrow money for said purposes and to impair its credit and capital, all to the damage of its business and property.

Eighteenth: That on divers occasions during 1936, Charles Walder acting for himself, the Tivoli Theatre, Inc. and the Walwal Corporation, of which corporations he was officer, director and stockholder, requested the defendants to give the Tivoli Theatre more favorable product and clearances thereon, and pleaded with defendants that Walwal Corporation was in arrears in its interest, amortization and tax payments because it was unable to obtain any revenue for its theatre and that unless defendants

permitted better clearances and better product, the Walwal Corporation would lose the Tivoli Theatre.

Eighty-first: That in or about the month of February, 1937, the said Paramount Enterprises, Inc., an affiliate and subsidiary of defendants Paramount Publix Corporation, Paramount Pictures, Inc. and Paramount Film Distributors, and dominated and controlled by said defendants, their officers, directors and stockholders, agreed to give more favorable product and clearances to the Tivoli Theatre, providing the plaintiffs Walwal Corporation and Charles Walder would agree to the formation of a new corporation to be known as the Tivoli Operating Corporation, of which corporation Paramount Enterprises, Inc. would have 50% of the corporate stock, and the remaining 50% of said stock to go to the Walwal Corporation; that the Tivoli Theatre would be taken away from Tivoli Theatre, Inc. and leased to the new corporation Tivoli Operating Corporation under terms to be dictated by defendants; that Paramount Enterprises, Inc. would have compensation pursuant to a management contract in addition to its stock interest, all as more fully set forth in the agreement between Walwal Corporation, Charles Walder and Paramount Enterprises, Inc. dated February 10, 1937, a copy of which is hereto attached and made part hereof as Exhibit "A".

Eighty-second: That due to the economic duress of defendants, plaintiffs submitted to the demands of the defendants pursuant to the aforementioned contract of February 10, 1937. The Tivoli Theatre, Inc. was dissolved, the Tivoli Operating Corporation was formed, 50 shares of its 100 shares of stock were issued to the plaintiff Walwal Corporation and 50 shares to Paramount Enter-

prises, Inc., whereupon Paramount Enterprises advanced a rental payment to the Walwal Corporation ear-marked for the payment of Walwal's back taxes and mortgage payments then in default.

Eighty-third: That upon information and belief, that the other defendants herein aided and abetted the said Paramount Enterprises, Inc., and its affiliates aforesaid, towards the culmination and consummation of said transaction by duress and coercion over and upon the said Tivoli Theatre, Inc., The Walwal Corporation, and the individual plaintiffs herein, as set forth in the preceding paragraph next hereof.

Eighty-fourth: That the said Tivoli Operating Corporation operated said Tivoli Theatre during the period from January 1, 1937 to and including May 24, 1947, and during such period the said Tivoli Operating Corporation received motion pictures for exhibition in its theatre aforesaid from the defendants herein, on equal terms with some of the other outlying neighborhood theatres.

Eighty-fifth: That the said Paramount Enterprises, Inc. during the period from January 1, 1937 to May 24, 1947, by reason of the defendants' conspiracy and illegal acts, wrongfully received from the Tivoli Operating Corporation in the form of dividends the sum of $40,999.45, and during said period received by virtue of the same illegal acts and duress, the further sum of $36,899.46 from the Tivoli Operating Corporation in the form of alleged management fees, making a total of $77,898.91 received by said Paramount Enterprises, Inc. from the Tivoli Operating Corporation, which sum it would not have received but for the conspiracy, unfair practices and economic duress herein alleged.

Eighty-sixth: That the said The Walwal Corporation, during the said same period between January 1, 1937 and May 24, 1947, also received in the form of dividends from the said Tivoli Operating Corporation, the sum of Forty Thousand Nine Hundred and Ninety-Nine and 45/100 ($40,999.45) Dollars; that the said The Walwal Corporation, during the said same period from January 1, 1937 to and inclusive May 24, 1947, received in addition to the foregoing, and in the form of rents, the sum of One Hundred and Thirteen Thousand Eight Hundred and Seventy-Nine and 36/100 ($113,879.36) Dollars, from the said Tivoli Operating Corporation, making a total of One Hundred and Fifty-Four Thousand Eight Hundred and Seventy-Eight and 81/100 ($154,878.81) Dollars, received by said The Walwal Corporation, during said period from January 1, 1937 to and inclusive of May 24, 1947, from the said Tivoli Operating Corporation,

Eighty-seventh: That it follows from the two preceding paragraphs next hereof, that during said period between January 1937 to May 24, 1947, that while said Tivoli Operating Corporation was receiving motion pictures for exhibition on equal terms with some of the other neighborhood theatres, it realized earnings of Two Hundred and Thirty-Two Thousand Seven Hundred and Seventy-Seven and 72/100 ($232,777.72) Dollars, consisting of the following:

(a) To Paramount in the form of dividends and management fees	$ 77,898.91
(b) To Walwal in the form of dividends	40,999.45
(c) To Walwal in the form of rents	113,879.36
Total	$232,777.72

Eighty-eighth: That in a free market unhampered by defendants' conspiracy and illegal acts, the fair and reasonable rental value of the Tivoli Theatre would be approximately $20,000 per year.

Eighty-ninth: That the said Tivoli Theatre, Inc., during said period of operation and discrimination, between 1929 and 1936, a period of approximately eight (8) years, sustained a total net loss of Four Thousand One Hundred and Eight and 27/100 ($4,108.27) Dollars; and that besides such loss, no rent was charged against said Tivoli Theatre, Inc., for use and occupation of said theatre premises, during and until the time that said Tivoli Theatre, Inc., conveyed the fee to said premises to the said Walwal Corporation, on August 15, 1931, as aforesaid, and that no rent was paid by said Tivoli Theatre, Inc., as lessee, to the said The Walwal Corporation, the owner in fee of said premises, after August 15, 1931, and until January 1937, and that the fair and reasonable total rental value of said theatre premises, during said period of approximately eight (8) years, amounted to the sum of at least One Hundred Sixty Thousand ($160,000.00) Dollars; so that if the said Tivoli Theatre, Inc. had paid a rental, during said period of about eight (8) years, the net loss over said period of about eight (8) years would have amounted to approximately $164,108.27; and that, besides, no moneys whatsoever, during said period of about eight (8) years were available for the declaration and payment of any dividends.

Ninetieth: That if the said Tivoli Theatre, Inc., and the individual plaintiffs, had not been discriminated against in favor of the theatres owned and controlled by defendants, as aforesaid, and if said Tivoli Theatre, Inc. were granted films on equal terms with the theatres owned or

controlled by defendants, during the period between 1929 and through the year 1936, and in view of the fact that the earnings of said Tivoli Operating Corporation for the period between January 1937 and May 24, 1947 (comprising a period of ten years and four and a half (4½ months)) amounted to $232,777.72, then it would follow by comparison of said amount with the earnings of said Tivoli Theatre, Inc., for the period of said approximate eight (8) years, that the earnings of said Tivoli Theatre, Inc., for said period of eight (8) years, would roughly amount to eight-tenths (8/10) of said $232,777.72 or to the sum of $186,221.60, even in a market controlled by defendants and a larger sum in a free and untrammeled market.

Ninety-first: That as a direct result of defendants' conspiracy and unfair practices as alleged herein, the Walwal Corporation was deprived of rents as alleged in Paragraph "Seventy-ninth" supra, which, in the regular course of its business it should have received on the Tivoli Theatre during the period 1931 to 1937 in the sum of One Hundred and Twenty Thousand ($120,000.00) Dollars, and similarly, the Walwal Corporation was deprived of rents on said theatre during the period 1937 to 1947 in the sum of approximately Eighty Six Thousand One Hundred and Twenty-One ($86,121.00) Dollars, as the difference between the rental paid by Tivoli Operating Corporation under the dictates of defendants' conspiracy, and the rental that would have been paid in a free market, wherein the Tivoli Theatre would enjoy a position based upon its facilities and location rather than one dictated by defendants' economic duress, and similarly, for the same reasons stated, the Walwal Corporation has been deprived of approximately Forty-Eight Thousand ($48,000.00) Dollars in rents between 1947 and the present, and further, the

Walwal Corporation has, as the equitable owner of the stock held by Paramount Enterprises, Inc. been deprived of the sum of Forty Thousand Nine Hundred Ninety-Nine and 45/100 ($40,999.45) Dollars which said Paramount Enterprises, Inc. withdrew as dividends from the Tivoli Operating Corporation making a total of approximately Two Hundred Forty-Seven Thousand Two Hundred Ten ($247,210.00) Dollars with respect to which the Walwal Corporation has been damaged by the unlawful acts of the defendants.

Ninety-second: That upon information and belief, that the said Paramount Enterprises, Inc., and the defendants Paramount Publix Corporation, Paramount Pictures, Inc. and Paramount Film Distributing Corporation have assigned, transferred and set over unto the defendants United Paramount Theatre, Inc. and Paramount Pictures Corporation, the moneys and benefits which the former have unlawfully secured from said Tivoli Operating Corporation.

Ninety-third: That on or about the 7th day of April, 1947, the said Tivoli Operating Corporation has been voluntarily dissolved, as aforesaid, and that thereupon and on or about the 3rd day of November, 1947, the individual plaintiffs Charles Walder, Ethel L. Walder, Alvin Walder, and Lester Walder, have organized the plaintiff corporation Tivoli Amusement Company, Inc., which latter corporation ever since its incorporation aforesaid has been and still is operating said Tivoli Theatre, as lessee from the said The Walwal Corporation; and that during the period 1947 to 1951 Tivoli Amusement Company, Inc. received its motion pictures for exhibition in its theatre on equal terms with some of the other neighborhood theatres

which constituted its normal competitors, but that in or about 1951 defendants in the institution of competitive bidding with respect to clearances gerrymanded the bidding areas causing the Tivoli Theatre to either bid against theatres far superior to itself, in size, if not in accoutrements, or be relegated to subsequent runs with respect to the theatres with which it normally had simultaneous clearance, while said theatres being part of the Paramount Chain, did their bidding in an area especially gerrymanded so as to eliminate the competition of the aforementioned larger theatres. That as a result of the aforementioned violation of the intent and spirit of the Paramount decree, theatres of the Paramount chain of the same standing and directly in competition with the Tivoli Theatre are receiving first-run clearance while the Tivoli Theatre is relegated to a subsequent run. That as a result of the aforementioned illegal acts and restraint of trade and in violation of the Decree of the Supreme Court of the United States, the Tivoli Amusement Company, Inc. has since 1952, and up to the present been prevented from making a fair profit in an open market and has been caused to sustain substantial damage in the sum of One Hundred Thousand ($100,000.00) Dollars.

Ninety-fourth: That as a result of defendants' acts as alleged the plaintiff Tivoli Operating Corporation has been damaged in the sum of Seventy Seven Thousand and Eight Hundred Ninety-Eight 91/100 ($97,898.91) Dollars, the Walwal Corporation has been damaged in the sum of approximately Two Hundred and Seventy Thousand One Hundred Twenty-One ($270,121.00) Dollars for loss of rents, and Forty Thousand Nine Hundred Ninety-Nine and 00/00 ($40,999.00) Dollars for loss of dividends, and

the Tivoli Amusement Company, Inc. has sustained damages in the sum of approximately One Hundred Thousand ($100,000.00) Dollars, together with the interest on said sums.

WHEREFORE, plaintiffs demand judgment against the defendants for the damages by them sustained in the sums in which said damages shall appear upon the proof, and requests that said damages be treated in accordance with the laws pertaining to damages sustained by reason of the violation of the Anti-Trust Laws, together with a reasonable counsel fee and in addition the costs and expenses of this action.

Dated, January 27, 1956.

HENRY PEARLMAN,
Attorney for Plaintiffs,
Office & P. O. Address,
1440 Broadway,
Borough of Manhattan,
City of New York.

Affidavit of Sidney Lefcourt

(A part of the record before the Court below)

Before me, an officer authorized by law to administer oaths, appeared SIDNEY LEFCOURT, who after being duly sworn according to law deposes and says:

(1) That, he is a resident of Miami, Florida, and that his office is located at 1150 Southwest First Street in that city;

(2) That, he has been a certified public accountant since 1941 and that presently he is a partner in the accounting firm of Weber, Thompson & Lefcourt;

(3) That, he has been engaged to make an appraisal of 50% of the stock of Tivoli Operating Corporation acquired by Paramount Enterprises, Inc., in 1937. That, he has made this appraisal based on the following information submitted to him:

Dividends paid on 50% of the stock of Tivoli Operating Corporation, referred to above, during the ten year period from 1937 to 1947	$40,999.45
Management fees paid to Paramount Enterprises, Inc. because of their ownership of 50% of the stock in Tivoli Operating Corporation, for the abovementioned period	36,899.46
Making a total of	$77,898.91

as the total profit accruing from the ownership of their stock in the Tivoli Operating Corporation.

(4) Affiant, further states that in the making of his appraisal, he has made certain assumptions, to wit:

(a) That, the $77,898.91 referred to above was earned ratably and equally over the ten year period.

(b) That, the record of earnings shown above, have been taken into consideration as if they had been known in 1937 when the stock was acquired.

(5) Based on the above statement of facts and assumptions related above, affiant has made a computation of value using a rate of 5% per annum as a fair and reasonable return and affiant now states that in his opinion, the 50% of the stock of Tivoli Operating Corporation acquired by Paramount Enterprises, Inc. in 1937 had a value when acquired of $61,000.00.

Further, affiant, sayeth not.

SIDNEY LEFCOURT.

(Sworn to October 24, 1958.)

Affidavit of Jules Pearlman

(A part of the record before the Court below)

STATE OF FLORIDA }
COUNTY OF DADE } ss.:

BEFORE ME, the undersigned authority, personally appeared JULES PEARLMAN, who upon being duly sworn, deposes and says as follows:

I am a qualified Real Estate Appraiser with offices at 1015 Seybold Bldg., Miami, Florida. I am a Senior Member of the American Society of Appraisers; a fee appraiser for the Federal Housing Administration, and Dade County Board of Public Instruction, and a member of the Appraisal Committee of the Miami Beach Board of Relators. I have lived continuously in Miami, Florida since 1919. I have been engaged in buying, selling, building and appraising Real Estate for over twenty years. I am a member of the Miami, Miami Beach, Florida State and National Association of Realty Boards.

The Tivoli Theatre is a neighborhood motion picture theatre, located at 744 West Flagler St., in the City of Miami, County of Dade, State of Florida. It has been owned and operated by the Walwal Corporation since 1928. On February 6, 1937 the theatre was leased to the Tivoli Operating Corporation. This was a newly formed corporation in which the capital stock was owned 50% by Paramount Enterprises and 50% by the Walwal Corporation. The lease was in effect for a period of ten and a quarter years to May, 1947.

At the request of Mr. Charles Walder, of the Walwal Corporation, I have investigated and analyzed the said lease for the purpose of estimating a Fair Rent Value for the entire period of the lease.

Fair Rent Value, or Economic Rent is, in this instance, the maximum amount of Rent the lessee is warranted in paying and the lessor entitled to receive, based on the contribution to earnings imputable to the land, building, equipment and good will, as is evidenced from rentals of comparable theatres to typical exhibitors of motion pictures.

Based on historical study of the subject property, and an analysis of the operating figures furnished me, and correlated with a study of data and statistics of the period in question compiled by recognized authorities on motion picture theatre operation,

I hereby estimate the
Total FAIR RENT VALUE
for the entire period
of the lease—Feb. 7, 1937
To May 24, 1947—for the
Tivoli Theatre, including
Its Good Will, to be
$150,000.00
or $14,630.00 per annum.

This rental is equivalent to approximately 20% of the gross receipts of $759,193.00 for the period; and is $36,121.00 more than the Contract Rent of $113,879.36 actually paid.

The period covered by the lease was characterized by the acquisition of control of many independent movie theatres by the large chains, and a relatively profitable one for the business. Rentals for going theatres ranged from 15% to 25% of the gross receipts. Rents were justified and acceptable if the cost of film rental and all operating expenses including rent, did not exceed 94%, and there remained a net of 6% of the gross receipts for Proft and Dividends.

The total amount paid in for the capital stock of the Tivoli Operating Corporation was $2000.00. The corpora-

tion paid out as dividends during the lease period the sum of $40,999.45 to Walwal Corporation and $40,999.45 to Paramount Enterprises, or a total of $81,998.90. Adding $36,899.46 paid to Paramount Management (which Mr. Walder claims was just additional profit) the total was $118,898.35. This is 15.7% of the gross receipts for profits and dividends. As stated above 6% of the gross receipts was the typical net return.

It is my opinion that the fees paid to Paramount Management were not justified and certainly appear excessive. However considering only as profit the dividends of $81,998.90 paid to Walwal and Paramount Enterprises, the net profits are still a comparably excessive 12% of the gross receipts.

If the rent paid were the Fair Rent of $150,000.00, instead of the Contract Rent, the net profit would have been $82,779.00 or 11% of the gross receipts. If we consider the amount paid Paramount Management as expense, the net profit based on the Fair Rent would be $45,789.00 or 6% plus of the gross receipts.

20% of the gross receipts is clearly indicated as the Fair Rent.

I hereby certify that my estimate of the Fair Rent Value of the Tivoli Theatre for the period from Feb. 6, 1937 to May 24, 1947, is $150,000.00; that this is in excess of the actual Contract Rent paid by $36,121.00.

I further certify that I have no past, present, or contingent interest in the property appraised; or the Walwal Corporation; that the statements contained herein are true to the best of my knowledge and belief; that the conclusions herein have been reached on the assumption of the accuracy of the figures, data, and statistics at hand.

JULES PEARLMAN
Affiant Jules Pearlman, A.S.A.

(Sworn to October 24, 1958.)

Opinion of Judge Dimock

(A part of the record before the Court below)

This is an action for treble damages for alleged violations of the antitrust law 15 U. S. C. § 1 et seq.

Pursuant to an opinion of Judge Weinfeld dated June 24, 1955, 132 F. Supp. 912, the action has been dismissed as to plaintiffs Charles, Ethel, Alvin and Lester Walder, individually and as trustees of Tivoli Theatre, Inc. Pursuant to an opinion of Judge Leibell, dated December 14, 1956, and an opinion on reargument dated March 12, 1957, the action has been dismissed as to plaintiff The Walwal Corporation. By order dated June 5, 1958, I dismissed the complaint as to the Tivoli Amusement Company, Inc. That leaves only the claim of plaintiffs Charles and Ethel Walder as trustees for Tivoli Operating Corporation.

Defendants now move for summary judgment dismissing the complaint as to the trustees for Tivoli Operating Corporation.

Tivoli Operating Corporation, herein Operating, a Florida corporation, was voluntarily dissolved on August 17, 1948. Plaintiffs Charles Walder and Ethel L. Walder, hereinafter plaintiffs, allege that they and defendant Fred H. Kent are its trustees by operation of Florida law and that no demand was made on Kent to join as plaintiff because of his alleged adverse interest.

Plaintiffs' theory is that, because of acts of defendants in an unlawful conspiracy to deprive the operators of the Tivoli Theatre in Miami, Florida, of prompt releases of motion pictures, the operators were forced by defendants to join with Paramount Enterprises, Inc., hereinafter Enterprises, a wholly owned subsidiary of defendants Paramount Publix Corporation, in the formation of Tivoli Operating Corporation and in the distribution of one-half of Operating's stock to Enterprises, at an inadequate price. Plaintiffs, on behalf of Operating, seek to recover from defend

ants the loss thus suffered by Operating. Defendants make this motion for summary judgment on the ground that Enterprises paid full value for the stock issued to it.

The agreement pursuant to which the stock was issued was made on February 10, 1937, between three parties, The Walwal Corporation, hereinafter Walwal, Charles Walder and Enterprises. By it Walwal, the owner of the Tivoli Theatre, agreed to lease it on certain terms to Operating, the corporation to be formed, Enterprises agreed to manage the theatre and see that Operating got pictures under a specified schedule and Walwal and Charles Walder gave covenants not to compete. The agreement provided that the stock of Operating should be equally divided between Walwal and Enterprises upon payment into the corporation of $1,000 by each. This agreement was carried out. The corporation was formed, the stock was issued and the lease was executed.

Prior to the execution of the agreement Walwal had been the owner of the theatre and it had been operated by a corporation known as Tivoli Theatre, Inc. That corporation was dissolved after Operating took over.

Defendants base their motion on what they say is a finding by Judge Leibell in this case that the lease had no value. They say that the lease was the only asset of Operating and, if it had no value, the sum of $1,000.00 paid by Enterprises for one-half of the stock obviously was not inadequate.

Judge Leibell's ruling was made on a motion which resulted in his dismissal of Walwal's claim. He based that dismissal on the ground that Walwal suffered no damage when it leased the theatre to Operating because the lease was upon what Judge Leibell found to be a fair rental. I see no reason for disagreeing with that finding and, even were I disposed to act upon an opposite view, I doubt that I could properly do so in view of the chaos which would result from inconsistent rulings in a single lawsuit. I

accept it as established then that Operating had to give a dollar for every dollar's worth it received under the lease. Under the lease Operating received not only the building but its furnishings and equipment. The lease carried it by operation of law the trade name and good will of the theatre. *Shubert* v. *Columbia Pictures Corp.*, 189 Misc. 734, 739, Sp. Term, McNally, J., aff'd 274 App. Div. 751; see also *Stogop Realty Co.* v. *Marie Antoinette Hotel Co.*, 217 App. Div. 555, 564-5; *McDonald* v. *First Nat. Bank of Attleboro*, 1 Cir., 70 F. 2nd 69.

Thus the theatre and the equipment and the good will came to Operating by way of the lease and Operating was obligated to pay as rent for them every cent that they were worth. Half of the stock of a corporation with only the lease as an asset would not be worth more than the $1,000 that Enterprise paid for it. Perhaps the stock was worth more than the zero figure attributable to the lease but, if so, the value must have come from Operating's only other asset: Enterprises' agreement to manage the theatre. This agreement to manage the theatre was, however, a contribution by Enterprises. Enterprises thus gave for the stock at least as much as its value since, by hypotheses, it was solely what Enterprises gave that lent any value to the stock.

I accordingly agree with defendants that plaintiff trustees for Operating have failed to show any loss and I therefore direct summary judgment dismissing the complaint as to Charles Walder and Ethel L. Walder as trustees for Tivoli Operating Corporation.

Settle order on notice.

Dated: September 27, 1958.

E. J. Dimock
United States District Judge

Motion for Reargument Denied

(Record, page 1584)

"Oct. 28, 1958

Motion respectfully referred to Judge Dimock at the request of counsel and with Judge Dimock's consent.

ALEXANDER BICKS
U.S.D.J."

"Motion denied.

October 30, 1958. Memo Endorsed.

E. J. Dimock, U.S.D.J.

Judgment Dismissing the Claims of Charles and Ethel Walder as Trustees of Tivoli Operating Corporation, Filed October 30, 1958

(Record pages 1599-1602)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The defendants having moved, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment dismissing the claims of plaintiffs, Charles Walder and Ethel Walder as trustees of Tivoli Operating Corporation; and

Judgment Dismissing the Claims of Charles and Ethel Walder as Trustees of Tivoli Operating Corporation, Filed October 30, 1958

The defendants having submitted memoranda of law in support of their motion and having appeared by their respective attorneys and the plaintiffs Charles Walder and Ethel Walder as trustees of Tivoli Operating Corporation having submitted memoranda of law in opposition to said motion and having appeared by their attorney and the motion having been orally argued before the Honorable Edward J. Dimock, United States District Judge; and

The Court after due deliberation having granted said motion by its opinion filed September 29, 1958; now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED, that the claims of plaintiffs Charles Walder and Ethel Walder, as trustees of Tivoli Operating Corporation alleged or set forth by them or on their behalf herein be and the same are hereby dismissed with prejudice and the Clerk is hereby directed to enter judgment thereon; and it is hereby further

ORDERED, ADJUDGED AND DECREED that the defendants recover of the plaintiffs their costs and disbursements in this action.

/s/ E. J. DIMOCK
U. S. D. J.

/s/ H. A. C.

Dated: October 30th, 1958,
New York, N. Y.

Judgment Entered October 30th, 1958.

/s/ HERBERT A. CHARLSON
Clerk

Opinion of United States Court of Appeals for the Second Circuit

Civ. 69-217

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 12—October Term, 1959.

(Argued October 9, 1959 Decided December 1, 1959.)

Docket No. 25471

CHARLES WALDER, *et al.*,

Plaintiffs-Appellants,

v.

PARAMOUNT PUBLIX CORP., *et al.*,

Defendants-Appellees.

Before:

LUMBARD, WATERMAN, FRIENDLY,
Circuit Judges.

Appeal from grant of defendants' motion for summary judgment, entered at pre-trial, United States District Court for the Southern District of New York, Dimock, *J.*, by which plaintiffs' claim for treble damages under the anti-trust laws was dismissed. Affirmed.

CLAUDIA PEARLMAN (Edgar A. Buttle, of counsel), New York City, for Plaintiffs-Appellants.

LOUIS PHILLIPS (E. Compton Timberlake, Marvin H. Ginsky, Bernard E. Kalman, of counsel), New York City, for Defendants Paramount Pictures Inc. (In Dissolution), Paramount Film Distributing Corporation and Paramount Pictures Corporation.

JEROME B. GOLDEN (E. Compton Timberlake, of counsel), New York City, for Defendant American Broadcasting-Paramount Theatres, Inc.

ROYALL, KOEGEL, HARRIS & CASKEY (John F. Caskey, Stanley Godofsky, of counsel), New York City, for Defendants TCF Film Corporation, a New York corporation, now dissolved, Warner Bros. Pictures Distributing Corporation and RKO Radio Pictures, Inc.

SCHWARTZ & FROHLICH (Myles J. Lane, Bernard R. Sorkin, of counsel), New York City, for Defendant Columbia Pictures Corporation.

WATERMAN, *Circuit Judge*:

From the year 1928 to the present time the Walder family, through various corporations, has had exclusive ownership of the Tivoli Theatre, a neighborhood motion picture house in Miami, Florida. Save for the period between 1937 and 1947 operation of the theater also has been exclusively in the hands of the Walders. Until 1931 ownership and operation were both in the name of Tivoli Theatre, Inc. In 1931 ownership was transferred to Walwal Corporation. In 1937 Tivoli Operating Corporation was organized to replace Tivoli Theatre, Inc. in the operation of

the theater. The total subscribed capital of Operating consisted of $2,000: $1,000 paid in by Walwal and $1,000 paid in by Paramount Enterprises, Inc.[1] Operating paid Walwal an annual rent of $9,600; Enterprises exerted its efforts in obtaining films for the Tivoli; and the net proceeds were divided between Walwal and Enterprises in proportions which varied over the ten-year existence of the arrangement. In 1947 these arrangements were terminated, and operation of the theater passed to Tivoli Amusement Company, Inc., a corporation wholly owned by the Walder family. In 1951 the members of the Walder family, in their various capacities, filed a private antitrust action alleging that Enterprises was included in management of the Tivoli Theatre, and in the profits therefrom, only because of prior coercion exerted by defendants in preventing the Tivoli Theatre from receiving motion pictures for exhibition which the theater would have obtained had distribution been on a properly competitive basis. Thus plaintiffs alleged injury from practices condemned in *United States* v. *Paramount Pictures*, 334 U. S. 131 (1948).

In the complaint there were five plaintiffs or groups of plaintiffs—(1) the members of the Walder family individually; (2) the members of the Walder family as trustees for Tivoli Theatre, Inc., a dissolved corporation; (3) the Walwal Corporation; (4) Tivoli Amusement Company, Inc; (5) two members of the Walder family as two of the surviving three trustees of Tivoli Operating Cor-

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[1] During the period here involved Paramount Enterprises operated theaters in the Miami region and was a wholly owned subsidiary of defendant Paramount Pictures, Inc.

poration, a dissolved corporation.[2] At various stages of the pre-trial proceedings all the plaintiffs have been eliminated from the case [3] except the plaintiffs in category (5), the trustees of Operating Corporation. As to them, on September 29, 1958 the district court, in an unreported opinion, granted defendants' motion for summary judgment. This appeal followed.

This lengthy discussion of the facts and the present posture of the case has been necessary in order to underscore the fact that the solitary question facing this court is the propriety of the district court's action in entering summary judgment against the trustees of Operating Corporation. No other plaintiffs are involved. As stated in the preceding paragraphs, Operating Corporation was, according to the Walder complaint, the fruition of the alleged conspiracy in violation of the anti-trust laws; i.e.,

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[2] Operating was formally dissolved on Oct. 12, 1948.

[3] A detailed history of the litigation is necessary at this point. The original complaint was filed on September 4, 1951. In an opinion dated June 24, 1955 and reported at 132 F. Supp. 912 (S. D. N. Y. 1955), Judge Weinfeld granted defendants' motion for summary judgment to the extent of eliminating the Walders from the case, both as individuals and as trustees of Tivoli Theatre, Inc. Judge Weinfeld reasoned that the Walders individually had no standing since the only injuries alleged related to corporations of which the Walders were stockholders. Judge Weinfeld then held that under the controlling Florida law, the trustees of a dissolved corporation, fully as much as the dissolved corporation, were bound by the requirement that suits by a dissolved corporation be brought within three years after final dissolution.

On December 17, 1956 Judge Leibell granted summary judgment dismissing Walwal from the case. He held that Walwal had received a fair rent from Operating in the ten-year period of Operating's existence. Walwal appealed from this decision, but on June 12, 1957 the appeal was dismissed for failure to prosecute.

On June 5, 1958 Judge Dimock dismissed the complaint as to Tivoli Amusement. No appeal was taken.

plaintiffs claim that but for the alleged violations Operating Corporation would never have come into existence. Thus the present plaintiffs complain that the very acts which created their corporation have also injured it, a difficult position for the trustees here to maintain successfully. In an effort to escape their predicament plaintiffs contend that Enterprises, a named co-conspirator though not a defendant, received as a result of the alleged coercion more from Operating than it contributed. Plaintiffs argue that Enterprises contributed only $1,000 in exchange for the far more valuable right to proceeds from the management of the theater resulting from the extremely favorable lease which Walwal offered to Operating. Plaintiffs' argument, however, is patently unsound. For its $1,000 contribution to Operating's capital Enterprises received exactly what it paid for, a 50% interest in a corporation that had no assets except the capital the two parties paid in. And even if we should assume that there was evidence to support plaintiffs' contention that the rent under the lease was unfairly low and that the point was still open to plaintiffs despite their failure to prosecute their appeal from Judge Leibell's order finding the rent to be fair,[4] the aggrieved party would be Walwal, not Operating. The district court quite properly concluded that Operating could not demonstrate injury. Cf. *Fanchon & Marco, Inc.* v. *Paramount Pictures,* 133 F. Supp. 839, 845 (S. D. N. Y. 1955).

Disposing of the case as we do, we do not reach appellees' other contentions.

Judgment affirmed.

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[4] See footnote 3, *supra.*

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of December, one thousand nine hundred and fifty-nine.

Present:

HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
Circuit Judges.

CHARLES WALDER, *et al.*,
Plaintiffs-Appellants,

v.

PARAMOUNT PUBLIX CORPORATION, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed, with costs to the appellees.

A. DANIEL FUSARO,
Clerk.

A true copy.

A. DANIEL FUSARO,
Clerk.